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No. ____

In the Supreme Court of the United States

ALBERT HAWKINS, *ET AL.*,
Petitioners,

v.

LINDA FREW, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Frew v. Hawkins*, the Court instructed that, once "the objects of [a federal consent degree binding a State] have been attained," a federal court "*must* exercise its equitable powers" and return "responsibility for discharging the State's obligation . . . *promptly* to the State and its officials." 540 U.S. 431, 442 (2004) (emphases added). This case presents the following question:

> Whether, under *Frew*, a federal district court must grant a Rule 60(b)(5) motion to dissolve a consent decree and return control of a state program to the democratically elected state officials once the state program achieves full compliance with federal law.

PARTIES TO THE PROCEEDING

Petitioners (variously, the "state officials" or the "officials") are:

- Albert Hawkins, Texas Commissioner of Health and Human Services;
- Chris Traylor, Texas State Medicaid Director (successor to David Ballard);
- Dr. Eduardo Sanchez, Commissioner of Health; and
- Bridgett Cook, employee of the Texas Department of Health, in her official capacity.

Respondents are:

- Linda Frew, as next friend of her minor child, Carla Frew;
- Carla Frew;
- Charlotte Garvin, as next friend of her minor children, Johnny Martinez, Brooklyn Garvin, and BreAnna Garvin;
- Shannon Garcia, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Garcia, and Allison Sanchez;
- Maria Ayala, as next friend of her minor children, Christopher Arizola, Leonard Jimenez, and Joseph Veliz;
- Mary Fisher, as next friend of her minor child, Tyrone T. Edwards; and
- Mary Jane Garza, as next friend of her minor children, Hillary Garza and Sarah Renea Garza.

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INTRODUCTION

Some three years ago, these same parties were before the Court in *Frew v. Hawkins*, 540 U.S. 431 (2004) (*Frew II*), concerning the enforcement of a consent decree that currently governs a Texas program for indigent youth under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) provisions of the Medicaid Act.[1] The case began with a class-action lawsuit in 1993, which was settled by consent decree in 1996. Although it was by no means

1. This case has spawned two rounds of appeals and multiple reported decisions: *Frew v. Gilbert*, 109 F.Supp.2d 579 (E.D. Tex. 2000) (*Frew I*), *rev'd*, *Frazar v. Gilbert*, 300 F.3d 530 (CA5 2002) (*Frazar I*), *rev'd*, *Frew II*, 540 U.S. at 431, *on remand*, *Frazar v. Hawkins*, 376 F.3d 444 (CA5 2004) (*Frazar II*), *on remand*, *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D. Tex. 2005) (*Frew III*), *aff'd*, *Frazar v. Ladd*, 457 F.3d 432 (CA5 2006) (*Frazar III*).

clear in 1996 that Texas was in violation of any federal law, the then-Attorney General (who is currently incarcerated in federal prison) nevertheless chose to sign the decree and to hand over day-to-day supervision of the Texas Medicaid program to plaintiffs' counsel and to Judge William Wayne Justice. That supervision has continued to this day.

Seeking relief from the ongoing federal-court management of Texas's EPSDT program, the successor state officials challenged its enforcement on federalism grounds. That challenge resulted in this Court's decision in *Frew II*.

In *Frew II*, the Court acknowledged the serious federalism concerns raised by the state officials:

> "The state officials warn that enforcement of consent decrees can undermine the sovereign interests and accountability of state governments .... The concerns they express are legitimate ones. If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers. They may also lead to federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law." 504 U.S., at 441.

But, the Court concluded, challenging the enforcement of the consent decree was not the appropriate procedural vehicle for vindicating those concerns. *Id.*, at 440. Instead, the Court explained, Federal Rule of Civil Procedure 60(b)(5) provides the correct vehicle for ending a decree once compliance with federal law has been attained. *Id.*, at 441-42. Indeed, the Court went so far as to include an entire separate section of the opinion—Part III—devoted solely to underscoring the vital interests of federalism, separation of powers, and democratic accountability that require

terminating ongoing decrees under Rule 60(b) once the State is in full compliance with federal law. As the Court expressly instructed, "when the objects of the decree have been attained," a federal court "*must* exercise its equitable powers to ensure that . . . responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Id.*, at 442 (emphasis added).

Following the Court's instruction, on remand the state officials filed a Rule 60(b)(5) motion seeking to terminate the consent decree because the State was (and is) in full compliance with federal law. The district court denied that motion, *see Frew III*, 401 F.Supp.2d, at 686 (Pet'r App'x 19-139), and the Fifth Circuit affirmed, *Frazar III*, 457 F.3d, at 441 (Pet'r App'x 1-15).

At this point, there is no serious dispute that Texas is in full compliance with federal law—indeed, Texas now has one of the very best Medicaid EPSDT programs in the Nation, spending more than other State on outreach and yielding participation rates that beat the national average. In 2002, the unanimous Fifth Circuit panel explicitly found *no proven violations of federal law whatsoever*, *Frazar I*, 300 F.3d, at 546-48, and the program has only improved since then.

But, because the consent decree contains over 300 separate and often vague and highly subjective provisions, the district court was able to conclude that the decree had not yet been fully satisfied, and so refused to dissolve or modify the decree. And the Fifth Circuit, having been reversed once in this case, was understandably reluctant to disturb the decree a second time.

The analysis of the courts below was entirely unmoored from the text of federal law. The district court's inquiry was not "is Texas in compliance with federal law," because that question ineluctably yields an answer in the affirmative. Rather, it was whether, as a policy matter, it is possibly conceivable to improve health care for indigents in Texas. Although perhaps a salutary

inquiry as matter of public policy, that is emphatically not the proper role for a federal court.

Petitioners do not suggest to the Court that there is a circuit split on this issue. Rather, there is an irreconcilable conflict between *Frazar III* and this Court's decision in *Frew II*, and that conflict merits this Court's review. *See* SUP. CT. R. 10(c). In *Frew II*, the Court labored at length to safeguard the ability of successor officials to implement state policy, and to avoid temporary officeholders being able to bargain away their authority and hand it over to federal courts in perpetuity. The Court pointed to Rule 60(b) as the proper avenue for vindicating the sovereign authority of the States and the democratic authority of state officials.

The State followed the Court's guidance, and the courts below have rejected that entreaty. If the Court now declines to grant review, the following will be the state of affairs in Texas:

- Texas is, and will remain, in full compliance with federal law.
- Texas is, and will remain, subject to the unfettered discretion of the federal district court to continue ordering regular and detailed changes in the precise minutia of administering the state EPSDT program.
- The Legislature of Texas, and the People who elect them, will have no ability at all to alter the district court's orders to spend billions of additional dollars on Medicaid programs above and beyond what is required by federal law.
- And, because of the ill-advised conduct of one (now incarcerated) state official over a decade ago, the State will be left with no viable means ever to regain control of its own health programs.

Such an outcome is entirely incompatible with our system of federalism that respects the autonomy of the sovereign States and

the limited role of the federal judiciary. Instead, it results in an egregious constitutional violation, contrary to separation of powers and in derogation of basic principles of democratic accountability.

At the outset, the only valid basis for this lawsuit was to "end a continuing violation of federal law," *Green v. Mansour*, 474 U.S. 64, 68 (1985)—and that objective has been entirely achieved. Now, even though the State is in full compliance with federal law, the policy-making role of the elected legislature has been replaced in perpetuity by an individual federal judge's subjective judgments of what might or might not be sound health policy (by definition, unmoored to any normative standards expressed in federal law).

In recent years, the problems surrounding consent decrees in institutional-reform cases have become fodder for much scholarly criticism and debate,[2] and have lead to federal legislation, both enacted and proposed.[3] Consent decrees such as the one here have been called into question because of their antidemocratic effect in stripping government officials (whether elected or appointed) of their ability to flexibly and efficiently administer the state or local programs or institutions for which the officials are responsible.

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2. *See, e.g.*, ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295; Transcript of Panel Discussion, *Government by Consent Decree?*, AM. ENTER. INST., June 9, 2005, *available at* http://www.aei.org/events/filter., eventID.1078/transcript.asp.

3. *See* Prison Litigation Reform Act of 1995, 110 Stat. 1321-71, *as amended*, 42 U.S.C. §1997e, *et seq.*; Federal Consent Decree Fairness Act, H.R. 1229, S. 489, 109th Cong. (2005).

In response to those concerns, in *Frew II*, the Court explicitly directed that, when "the objects of the decree have been attained," a federal court "*must* exercise its equitable powers" and return "responsibility for discharging the State's obligation . . . *promptly* to the State and its officials." 540 U.S., at 442 (emphases added). Because the courts below disregarded that admonition, the Court should grant review to vindicate its mandate and to protect the democratic authority of the people.

OPINIONS BELOW

The court of appeals's opinion is reported as *Frazar v. Ladd*, 457 F.3d 432 (CA5 2006) (Pet'r App'x 1-15). The court of appeals's order denying the petition for panel rehearing and rehearing en banc is unreported and can be found at Pet'r App'x 16-18. The district court's order denying the state officials' Rule 60(b)(5) motion is reported as *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D. Tex. 2005) (Pet'r App'x 19-139).

JURISDICTION

The court of appeals's judgment was entered on July 20, 2006. Pet'r App'x 1. The court of appeals's order denying the state officials' petition for rehearing en banc was entered on September 7, 2006. *Id.*, at 16. Under 28 U.S.C. §1254(1), the Court has jurisdiction to review this petition for writ of certiorari.

STATUTORY PROVISIONS AND RULE INVOLVED

The EPSDT provisions of the Medicaid Act involved in this case are found at 42 U.S.C. §§1396a(a)(43), 1396d(r), are lengthy, and therefore in accordance with SUP. CT. R. 14(f), (i)(v), are set forth at Pet'r App'x 142-47.

Federal Rule of Civil Procedure 60(b)(5):

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

judgment, order, or proceeding for the following reasons: . . . it is no longer equitable that the judgment should have prospective application . . . ." FED. R. CIV. P. 60(b)(5) (Pet'r App'x 140).

STATEMENT OF THE CASE

I. THE EPSDT PROGRAM

Congress created the Medicaid program in 1965 when it added Title XIX to the Social Security Act. *Harris v. McRae*, 448 U.S. 297, 301 (1980). The Medicaid program provides federal financial assistance to States that choose to reimburse certain costs of medical treatment for the poor, elderly, and disabled. *See* 79 Stat. 343, *as amended* 42 U.S.C. §1396, *et seq.*; *Harris*, 448 U.S., at 301. "Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

One aspect of the Medicaid Act is the EPSDT program, which is intended to be "the nation's largest preventative health program for children." H.R. 3299, 101st Cong. §4213 (1989). The EPSDT provisions of the Medicaid Act requires states to "inform[] all [eligible] persons . . . of the availability of services as described in [the statute] and the need for age-appropriate immunizations against vaccine-preventable diseases," to "provid[e] or arrang[e] for the provision of . . . screening services in all cases where they are requested," and to arrange for "corrective treatment" in such cases. 42 U.S.C. §1396a(a)(43)(A)-(C). The Act defines EPSDT services to include certain screening, vision, dental, hearing, and other services. *Id.* §1396d(r).

II. THE LAWSUIT

This class-action lawsuit began in 1993, with plaintiffs claiming that the State was not providing federally mandated EPSDT

benefits.[4] The lawsuit was settled in 1996, under an exhaustive 78-page consent decree that resulted in the federal district court's assuming ongoing responsibility to supervise the day-to-day operations of Texas's EPSDT program, a.k.a Texas Health Steps (THSteps). Since the entry of the consent decree, the performance of THSteps has improved dramatically—under objective, national benchmarks—with the overall funding more than doubling and the personnel devoted to the program increasing over 3,500 percent (from 10 to more than 350).

Nevertheless, in 2000 the district court found that the state officials had violated the consent decree and ordered the parties to submit proposed corrective action plans. On appeal, the Fifth Circuit vacated the district court's orders. *Frazar I*, 300 F.3d, at 533, 551. Two holdings were central to the Fifth Circuit's decision: *first*, that plaintiffs had failed to demonstrate any current, ongoing violations of federal law, and *second*, that the Eleventh Amendment prohibited enforcement of the consent decree absent an ongoing violation of federal law. *Id.*, at 543, 546-48.

III. *FREW II*

Afterwards, plaintiffs petitioned this Court, and the Court unanimously reversed the Fifth Circuit on the second of its holdings. This Court held that enforcing the consent decree did not violate the Eleventh Amendment. *Frew II*, 540 U.S., at 439.

But that was not all the Court had to say on the subject of consent decrees in institutional-reform cases. The Court expressed deep concerns about the damage to the principles of federalism, separation of powers, and democratic accountability that consent decrees might engender when temporary officeholders permanently bargain away their authority and bind their successors to continuing

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4. R.89-93.

federal-court oversight and management of state programs. The Court devoted an entire portion of its opinion (Part III) to the great weight federal courts must accord the policy views of subsequently elected state officials. *See id.*, at 441-42.

The Court did not disagree with the legal proposition that, once there are no longer any ongoing violations of federal law, consent decrees against state officials must be dissolved. Rather, the Court concluded that challenging the enforcement of a consent decree was the wrong procedural vehicle to attack those decrees. Instead, the Court pointed to Rule 60(b) as the proper vehicle to seek dissolution of a consent decree against state officials. And the Court was unequivocal about how to evaluate such motions:

> "a federal court *must* exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Id.*, at 442 (emphasis added).

Moreover, the Court admonished that consent decrees must be limited to "reasonable and necessary implementations of federal law" lest they deprive democratically accountable state officials of their legislative and executive powers. *Id.*, at 441.

IV. THE RULE 60(B)(5) MOTION

On remand after *Frew II*, the Fifth Circuit dismissed the state officials' appeal and remanded the case to the district court. *See Frazar II*, 376 F.3d, at 447. In the district court, the state officials followed the instruction of Part III of the Court's *Frew II* opinion and filed a motion to dissolve the decree under Rule 60(b)(5).[5] An

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5. R.10096.

eight-day evidentiary hearing followed.[6]

Given that the Fifth Circuit in *Frazar I* had already found that there were no proven violations of the EPSDT statute by the THSteps program, *see* 300 F.3d, at 548, the officials used the 60(b)(5) hearing to demonstrate how far beyond the minimal dictates of the EPSDT statute that THSteps now extends. The officials' motion pointed out the myriad ways in which THSteps satisfied the Medicaid statute's EPSDT provisions and the extraordinary efforts that the officials and program administrators had made since the lawsuit began in 1993.

Several facts proven by the officials illustrated this. For instance, Texas's medical-participation rate, which was 29 percent in 1993, improved to 62 percent in 2004—well above the 2000 national average of 49 percent. Its medical screening rate, which was 48 percent in 1993, improved to 71 percent in 2003—also the 2000 national average of 65 percent. Texas's dental-participation rate, which was 14 percent in 1993, increased to 45.5 percent in 2003—well above the 1998 national average of 21 percent. The Texas infant-immunization rate increased from 52 percent in 1994 to 72.1 percent in 2000, which is comparable to the 2000 national average of 77.6 percent. In 2004, it was reported that the participation rate for children from birth to one year old was 99 percent. And, starting in 2002, Texas implemented a statewide newborn-hearing screening program, which screens approximately 98 percent of all newborns. This was a substantial increase from 1993, when hearing screening services, although available for EPSDT-program coverage, did not have substantial statewide coverage. Texas's outreach and informing efforts to increase awareness and understanding of the THSteps program had also

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6. Tr., Vols. 1-8 (June 6-10, 13-15, 2005) [hereinafter cited as (Vol.#).Tr/05.(Pg.#)].

borne fruit. A survey showed that 90 percent of program participants adequately understood the Texas EPSDT program.[7]

The size of the THSteps program was also shown to have grown steadily since 1993. THSteps employed a full time staff of only 10 persons in 1993. In 2004, it employed several hundred, including 128 full-time employees at the Department of State Health Services, and more than 230 employees under contract with an outside contractor, Maximus, Inc.—a government consulting and contracting organization that performed, and through Texas Access Alliance continues to perform, enrollment and outreach services. The record reflected that these professionals had worked diligently over the last decade to increase service levels.[8]

In addition, the record showed that since 1993, the number of eligible recipients had grown by 70 percent, from 390,021 in 1993 to 1,098,822 in 2003. During this time, the number of examinations provided to program participants had tripled, from 635,272 to 1,815,005.[9] And the total number of THSteps medical checkups for FY 2004 was 2,076,610.[10]

Furthermore, overall levels of state funding were shown to have increased dramatically. In 1994, THSteps's dental-administration and client-services budget was $82,780,093. By 2004, that amount had increased to $378,136,522. In 1994, THSteps's medical-administration and client-services budget was $34,571,577. In 2004, that amount increased to $136,895,310. In total, it was

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7. R.10102-03, 101111; DX 96.

8. R.10106.

9. *Id.*

10. DX 105.

shown that Texas spent more than twice as much per eligible recipient in 2004 than it did in 1994, and that each eligible recipient received almost twice as many services.[11]

Dramatic changes had also been made to the THSteps outreach program. In 1993, Texas's spending on outreach was negligible, with no outside contractors and no state employees devoted exclusively to outreach. But as of the hearing, *Texas was spending more on outreach than any other state in the nation. Frazar I*, 300 F.3d, at 533. In 1999, Texas signed the largest outreach contract in the nation and made over 4.8 million outreach contacts (an average of more than three per class member), up from 2 million in 1995. As a result, THSteps realized a large increase in the number of outreach efforts performed annually. In 1995, approximately 152,000 outreach efforts were reported in an average month (approximately 1.8 million per year). In 2002, approximately 670,000 outreach efforts were reported in an average month (approximately 8 million per year).[12]

In addition to all this, there was even more evidence that THSteps complied with federal law:

- Texas paid Maximus $16,000,000/yr. to provide outreach and informing services to program participants,[13] as well as another $16,000,000/yr. for Maximus to provide enrollment broker services for participants located in areas served by managed care organizations (MCOs).[14]

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11. R.10106-07.

12. R.10107.

13. 1.Tr/05.29.

14. 8.Tr/05.82.

- Maximus had approximately 450 employees performing outreach and enrollment services for the THSteps program,[15] and these employees assisted approximately 2,182,067 callers on its toll-free telephone line, made approximately 1,011,878 home visits, and distributed over 24 million THSteps program brochures to more than 6,000 state agency offices, providers, and other entities.[16]

- In FY 2004 alone, Maximus made approximately 11,450 home visits and placed or received over 85,560 telephone calls to families with children enrolled in THSteps; by FY 2005, Maximus was handling approximately 100,000 calls a month and making over 12,000 home visits per month.[17]

- Each month, families with children enrolled in THSteps receive a Medicaid I.D. letter from Texas's Health and Human Services Commission (HHSC) listing, for each covered child, whether a medical and/or dental check-up is due and other services (*e.g.*, vision and hearing) for which the child is eligible. For children in managed care, the Medicaid I.D. letter also identifies their primary care physician.[18]

- HHSC imposes strict standards on all program MCOs—*e.g.*, specialists must see a program participant for routine care within two weeks, urgent care within 48 hours, and emergency care within 24 hours[19]—and these MCOs conduct

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15. DX25, at 95.

16. 1.Tr/05.77-78; 8.Tr/05.26-27, 34; DX23.

17. 1.Tr/05.50; DX23.

18. 3.Tr/05.7, 10; DX15.

19. 2.Tr/05.98.

their own outreach activities, as well as providing their own toll-free help lines and 24-hour nurse lines.[20]

- Ranked against the 45 other states and the District of Columbia that submitted federally required medical screening participation ratio data to the Center for Medicare and Medicaid Services in 2003, Texas, with a ratio of .60, ranked 16th—higher than all but 14 states and the District of Columbia.[21]

On the strength of this evidence, the officials argued that, "because the ends of the decree ha[d] been met, it [was] no longer just or equitable to give the [consent decree] prospective application."[22] Those ends, the officials explained, were "to facilitate [the officials'] compliance with the requirements of federal law pertaining to the implementation of the State's [EPSDT] program."[23] The officials, relying on *Frew II*, advised that their motion responded to "the Supreme Court's invitation" to terminate the consent decree in that "the ends of the decree—ensuring the compliance of Texas officials with federal law—have been met."[24] Alternatively, the officials argued that, if the decree were not terminated entirely, then it should at least be modified in several respects.[25]

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20. 2.Tr/05.20-22, 121, 155, 159; 4.Tr/05.140, 188-90.

21. 3.Tr/05168-69; DX97.

22. R.10099.

23. *Id.*

24. R.10104-05.

25. R.10113-20.

At the hearing and in their post-hearing brief, the officials pointed out that no federal funding had ever been withheld from Texas for failing to meet the HHSC Secretary's annual participation goals,[26] and that the evidence showed "a well-thought out and generally well-executed plan" for providing EPSDT services to Texas's indigent children.[27]

V. *FREW III*

On August 19, 2005, the district court denied the officials' 60(b)(5) motion. Rejecting the officials' arguments regarding the applicable legal standard for consent-decree dissolution under Rule 60(b)(5) in light of *Frew II*, *see Frew III*, 401 F.Supp.2d, at 630 (Pet'r App'x 29), the district court read *Frew II* as simply reaffirming the standard employed in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), and *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (CA3 1979). The district court also relied heavily on the Fifth Circuit's opinion in *Cooper v. Noble*, 33 F.3d 540 (CA5 1994), as stating the appropriate standard. *See Frew III*, 401 F.Supp.2d, at 628-30, 632-33 (Pet'r App'x 32-34).

The district court globally held that the officials failed to prove a significant change in factual circumstances that warranted revising the consent decree, and that their demanded relief was suitably tailored to any changed circumstances. *See id.*, at 686 (Pet'r App'x 139). Moreover, the court broadly concluded that the officials failed to prove that changed factual circumstances affected compliance with, or the workability or enforcement of, the consent decree and that any changes occurred despite the officials' reasonable efforts to comply with the consent decree. *Id.* Finally,

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26. R.11810.

27. 8.Tr/05.82.

the court held there was no compelling reason to modify the decree sua sponte. *Id.*

VI. *FRAZAR III*

The state officials appealed the district court's order to the Fifth Circuit, invoking 28 U.S.C. §1291. The Fifth Circuit affirmed the district court. *Frazar III*, 457 F.3d, at 441 (Pet'r App'x 15). In rejecting the officials' appeal, the Fifth Circuit fairly summarized the officials' position:

> "[The state officials] contend that the district court applied the incorrect legal standard for consent decree modification in institutional reform cases and argue that the district court failed to follow the Supreme Court's admonishments in *Frew II* regarding federalism, separation of powers, democratic accountability, and deference to those state officials responsible for administering public institutions and programs. The contention is that instead of following *Frew II*, the district court placed too much importance on the *Rufo* test for consent decree modification .... [And the officials] ... argue that *Frew II*, requires the district court to promptly return the State's program to state officials if there are no ongoing violations of federal law." *Id.*, at 435-36, 437-38 (Pet'r App'x 4-5, 8-9).

But the Fifth Circuit disagreed that "*Frew II* usher[ed] in a new standard for consent decree modification," and refused to entertain the notion that *Frew II* might have at least "alter[ed] the standard for modification of consent decrees." *Id.*, at 438 (Pet'r App'x 9). Rather, the Fifth Circuit believed that *Frew II* merely "directed lower courts to *Rufo* and *Shapp* as examples of the proper application of Rule 60(b)(5) to modification of institutional reform consent decrees ...." *Id.* Thus, the court held "that the district court properly determined that the applicable legal standard in this case came from *Rufo* and *Cooper*." *Id.*, at 438-39 (Pet'r App'x 11).

The Fifth Circuit also stated that "*Frew II* did not mention federal law compliance as a factor in Rule 60(b)(5) analysis," *id.*, at 438 (Pet'r App'x 9), and that "[b]ecause the object of the consent decree is not mere compliance with federal law, the objects of the decree have not been obtained," *id.*, at 439 (Pet'r App'x 12).

The state officials next petitioned the Fifth Circuit for an en banc rehearing, which on September 7, 2006, the court denied.[28] This petition for certiorari followed.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW IN THIS CASE IN ORDER TO HALT THE DELETERIOUS EFFECTS THAT CONSENT DECREES IN INSTITUTIONAL-REFORM CASES ARE HAVING ON REPRESENTATIVE DEMOCRACY.

The past several decades have witnessed the rise of consent decrees used in institutional-reform litigation. "Institutional reform litigation" encompasses "cases in which courts oversee schools, prisons, housing authorities, and other government institutions." David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 U.C.L.A. L. REV. 1015, 1016 (2004). Institutional-reform cases require "exercises of judicial power in the public sphere," *id.*, at 1018, and "involve essentially political questions, although the cases remain adjudicative in form." Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 887.

Such cases have two defining characteristics: they generally rest on a claim that some constitutional or statutory right has been abridged, and they frequently require the court to assume an ongoing role in monitoring and enforcing institutional change.

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28. Pet'r App'x 16-18.

Steven R. Shapiro, *The Modification of Equitable Decrees: A Critical Commentary*, 50 BROOK. L. REV. 459, 459 n.3 (1984). As to the latter characteristic, a consent decree is frequently the vehicle by which the court exercises its oversight and enforcement role. This Court has observed that "[c]onsent decrees have elements of both contracts and judicial decrees." *Frew II*, 540 U.S., at 437 (citing *Firefighters v. Cleveland*, 478 U.S. 501, 519 (1986)). And "[a] consent decree 'embodies an agreement of the parties' and is also 'an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgements and decrees.'" *Id.* (quoting *Rufo*, 502 U.S., at 378).

Thus, an institutional-reform-case paradigm begins with "reform-minded attorneys" identifying a government program or institution that allegedly is violating some constitutional or statutory requirement, which they then bring as a lawsuit in federal district court. *See* DEMOCRACY BY DECREE, *supra*, note 2, at 3. Frequently, the district court "encourages" the parties to "negotiate a detailed plan to fix the [challenged program]," with the plan ultimately being reflected in a consent decree. *Id.*, at 4. Government officials must then obey the decree, and the plaintiffs' lawyers are the monitors of the government's compliance with the decree. *Id.* Such decrees can, and commonly do, remain in effect for decades.

This model of institutional-reform litigation has created serious challenges to the ability of many subsequent state and local officials to flexibly implement salutary public-policy initiatives and changes to a government program covered by a consent decree. Indeed, in recent years, many long-standing consent decrees in several states arising from institutional-reform litigation have come to be widely viewed as an affront to our American system of representative democracy. *See Fe[illegible] Consent Decree Fairness Act: Hearing on H.R. 1229 Before the Subcomm. on Courts, the Internet, and*

Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 7-8 (2005) (statement of Rep. Roy Blunt (D-Mo.)) (discussing consent decrees in Utah, Connecticut, Los Angeles, and New York City); *see also id.*, at 20-24 (prepared statement of David Goetz, Tenn. Comm'r of Fin. & Admin.) (discussing consent decree in Tennessee regarding that State's Medicaid program); *id.*, at 30-31 (prepared statement of David Schoenbrod, Professor, New York Law School) (discussing a housing-authority consent decree in New York City); *id.*, at 55-56 (prepared statement of Mark L. Shurtleff, Utah Att'y Gen) (discussing a child-welfare consent decree in Utah); *A Review of Fed. Consent Decrees: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 109th Cong. 10-12, 67-71 (2005) (testimony and prepared statement of Troy King, Ala. Att'y Gen.) (discussing several Alabama consent decrees).[29]

This view, held by many legal scholars and political leaders, sees consent decrees as potentially dangerous because of their effect in eroding the pillars of our system of government: democratic

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29. It is believed that "[t]here are consent decrees in all 50 states on issues ranging from prisons to child care." 151 CONG. REC. S3343 (daily ed. Apr. 7, 2005) (statement of Sen. Lamar Alexander (R-Tenn.) taken from the article: Lamar Alexander, *Free the People's Choice*, LEGAL TIMES, Apr. 4, 2005); *see also Review of Federal Consent Decrees*, *supra*, at 29 (testimony of Ross Sandler, Professor, New York Law School) (stating that consent decrees are present in every state). Although no one is sure exactly how many consent decrees exist, there are hundreds and perhaps thousands of them across the country, and there seems to be agreement that they are "ubiquitous" and "commonplace." 151 CONG. REC., at S3342 (statement of Sen. Alexander); *Review of Fed. Consent Decrees*, *supra*, at 29 (testimony of Ross Sandler); Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform Consent Decrees*, at 14, *available at* http://region.princeton.edu/media/pub/pub_xtra_43.pdf.

accountability, separation of powers, and federalism. The issues surrounding institutional-reform consent decrees have been eloquently captured by one United States Senator as follows:

> "It is the question of a consent decree that may have been entered into at one point in time between an attorney for a government institution—sometimes it is the Attorney General; sometimes it may be the attorney for the school board or the county or the city—and to what extent for all time does that consent decree bind that Government entity .... It is a question of How do we best preserve the proper balance between executive, legislative, and judicial branches? How do we preserve the power of the American people to control the policies of their Government? And to what extent should an Attorney General or Governor or school board superintendent who 15 years ago, perhaps now in the grave, to what extent can they control the school board policy of today and how do you deal with that?" *Review of Federal Consent Decrees*, *supra*, at 1 (statement of Sen. Jeff Sessions (R-Ala.)).

Institutional-reform consent decrees can pose this threat in a myriad of ways. For starters, they can foster a "rigid system" that does not allow "the flexibility necessary for elected representatives to discharge their responsibilities." *Hearing on H.R. 1229*, *supra*, at 2 (statement of Rep. Lamar Smith (R-Tex.), Chairman of the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary). Such decrees do this principally because "[t]hey can last literally for decades, long after the local or State officials who may have been involved with those cases in the first instance have long since left office," 152 CONG. REC. H3895 (daily ed. June 13, 2006) (statement of Rep. Scott Garrett (R-N.J.)), and because, "in the eyes of many defendants," their termination can be "inordinately difficult." Rosenberg, *supra* note 29, at 20; *see also* 151 CONG. REC., at S3343 (statement of Sen. Alexander)

(observing that "[o]nce these decrees are set, they are very difficult to change").

Thus, "[w]hen a consent decree lasts for decades, as many of them do, many elected officials never have the opportunity to take responsibility for important public services. A politician can say, I would really like to do something about the [government program or institution] but I cannot because of that consent decree." 152 CONG. REC. H3892 (daily ed. June 13, 2006) (statement of Rep. Blunt). In other words, an institutional-reform consent decree can have the deleterious effect of making public officials less responsible and accountable to their constituency by providing that official with an excuse for his or her inaction regarding a local or state program or institution under that official's charge. *Hearing on H.R. 1229*, *supra*, at 7 (statement of Rep. Blunt). "State and local bureaucracies have powerful incentives to put themselves under a consent decree that will immunize their decisions and averred budgetary 'needs' against legislative control and budgetary claims by rival agencies and their constituencies." *Review of Fed. Consent Decrees*, *supra*, at 42 (prepared statement of Michael S. Greve, Am. Enter. Inst. for Pub. Policy Research). And "[p]oliticians have equally powerful incentives to shirk political responsibility for the administration of public programs, and 'Sorry, we are under a court order' is a ready means to that end." *Id.*

Furthermore, as this Court recognized in *Frew II*, institutional-reform consent decrees "may improperly deprive future officials of their designated legislative and executive powers" and inhibit "successor officials, both appointed and elected, [from] bring[ing] new insights and solutions to problems of allocating revenues and resources." 540 U.S., at 441, 442; *see also* 151 CONG. REC., at S3343 (statement of Sen. Alexander) (observing that "[o]nce these decrees are set . . . reform and common-sense adjustments over time [are] virtually impossible"). That is, a decree may allow public officials "to immunize their policy decisions from political change

by entering into perpetual consent decrees," *Hearing on H.R. 1229*, *supra*, at 17 (testimony of David Goetz). In doing so, the decree "hamstrings" government, making it difficult for subsequent officials "to manage effective operations and . . . to respond to new conditions by designing and implementing reform measures that are necessary for the good of the entire State." *Id.*, at 17-18. Consent decrees can thus act as "roadblocks" to reform. *Id.*, at 27 (prepared statement of David Goetz). "Bound by Federal consent decrees, elected officials are less able to balance political and budgetary interests when legislating, nor can these officials react and adjust to unforeseen constituent or budgetary needs when they arise." *Id.*, at 2 (statement of Rep. Smith). "To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government." McConnell, *supra* note 2, at 297.

In addition to the undemocratic effect that institutional-reform consent decrees may have, they may also operate contrary to the principles of separation of powers and federalism. Consent decrees may "chip away at the authority of [state and] local officials," 152 CONG. REC., at H3895 (statement of Rep. Garrett), by "plac[ing] . . . trial courts in the business of public administration," *Hearing on H.R. 1229*, *supra*, at 1 (statement of Rep. Smith). "By their very nature," such decrees "involve federal judicial supervision over a function that our system of government has assigned to the political branches of state government." *Id.*, at 25 (prepared statement of David Goetz). Thus, "[u]nder many consent decrees, traditional roles of State or local government officials are shifted to the judge and the lawyers involved in negotiating the consent decree." *Id.*, at 2 (statement of Rep. Smith).

But, as one United States Senator has aptly noted:

> "There is no democracy when federal courts run police departments, school districts, foster care programs, and state

> insurance programs. Judges are not public policy experts, and they are not accountable to the electorate for the choices they make . . . . Consent decrees have, unfortunately, evolved into a mechanism for the federal judiciary to exercise 'an overruling influence' on many state and local governments." 151 CONG. REC., at S3343 (statement of Sen. Alexander) (quoting THE FEDERALIST No. 48 (James Madison)).

Many believe that institutional-reform consent decrees "result[] in judges engaging themselves in affairs outside of their constitutional job description, [and] outside of the very framework of the protections that we have established . . . of checks and balances," 152 CONG. REC., at H3895 (statement of Rep. Garrett), and give federal judges "undue authority" over local and state programs. *Hearing on H.R. 1229*, *supra*, at 26 (prepared statement of David Goetz).

And, while it is acknowledged that "[f]ederal consent decrees can be an effective judicial tool," critics warn that there is the danger that "activist judges" might "use them to lock in policy changes long after the State or local official that agreed to the decree has left office." 152 CONG. REC. H1892 (daily ed. Apr. 27, 2006) (statement of Rep. Virginia Foxx (R-N.C.)). As one critic of institutional-reform consent decrees has observed, consent decrees that involve federal judicial supervision over state programs or institutions "may be appropriate and is justified by the original consent of the state and by the felt need to address an alleged violation of federal law . . . . However, neither of those justifications support[] the perpetual governance by consent decree of a state institution." *Hearing on H.R. 1229*, *supra*, at 25 (prepared statement of David Goetz).

Therein lies the rub. Because federal consent decrees have a tendency to self-perpetuate and last longer than needed to protect

rights, a more flexible means of terminating consent decrees than the current *Rufo* test is needed to restore a proper balance in our federalist system of governance. The current *Rufo* test "is demanding and time consuming," making "it . . . difficult for—at least as the lower court's have understood it—state and localities to get out from under decretal requirements that make no sense and are unnecessary to protect rights." *Id.*, at 30 (prepared statement of David Schoenbrod).

Indeed, the harm created by *Rufo*'s relatively inflexible standard is compounded by the fact that what is perceived to be vague provisions in consent decrees may lead to a virtually inescapable process whereby a federal judge may interpret decree provisions to require something which goes beyond anything that the parties ever initially agreed to, much less is required by federal law. An example from this case highlights the problem of shifting and elusive standards, making the *Rufo* test unduly difficult to satisfy. For instance, in *Frew I*, the district court found a violation of ¶247 of the consent decree regarding toll-free telephone help lines based on the court's interpretation of the decretal phrases "prompt service," "answered promptly," and "knowledgeable, helpful and polite." *See* 109 F.Supp.2d, at 642-46. The court interpreted those phrases to establish certain performance standards, even though the phrases are the extent of the parties' agreement and federal law does not mandate the performance criteria the court devised. *See id.* Under such an interpretive process—where there is nothing to prevent the district court from subjectively setting any performance criterion that it sees fit—achieving compliance with the consent decree is like hitting a moving target.

When addressing whether to terminate an institutional-reform consent decree, the focus needs to be on "plaintiffs' rights rather than the deal struck in the consent decree." *Hearing on H.R. 1229*, *supra*, at 29 (testimony of David Schoenbrod). Even consent-decree supporters acknowledge that "the best way for a State to get

out of a consent decree is for it to comply with the law." *Id.*, at 5 (statement of Rep. John Conyers, Jr. (D-Mi.)). But that has not been the case here. For example, under nationally recognized measures, THSteps performs well at providing requested services.[30] Notwithstanding this fact, the district court refused to terminate or even modify two decree provisions of reporting requirements regarding medical and dental checkups (¶¶171 and 284), even though the provisions manifestly exceed the minimum reporting requirements of federal law, and despite the fact that the officials presented expert testimony that ¶¶171 and 284's requirements were neither useful nor cost effective.[31]

In light of all this, the Court should fully embrace and establish—to the extent it has not already done so in *Frew II*—the view that achieving compliance with federal law should be sufficient to end a consent decree. Only then can "some democratic accountability" be restored "to a process that is completely out-of-control and on autopilot." Transcript of Panel Discussion: *Government by Consent Decree?*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, June 9, 2005 (statement of Michael S. Greve).

II. THE COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *FREW II*.

As the foregoing discussion highlights, perhaps the single biggest problem with institutional-reform consent decrees is the inordinately difficult standard (*Rufo*) for dissolving them and freeing state and local governments from the tight grip of federal

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30. R.11831-32, 11834-35, 11840; 2.Tr/05.44-46; 6.Tr/05.6-16; DXs 46, 47, 97.

31. 3.Tr/05.203-06.

judicial oversight. Believing that the teachings of *Frew II*'s mandatory language meant what it said , the state officials pursued *Frew II*'s recommended Rule 60(b)(5) route to terminate the EPSDT consent decree here.

But thus far, the officials' effort to regain control over THSteps has been stymied. Both the district court and the Fifth Circuit rejected the officials' attempt to terminate the decree on the basis of *Frew II*, Rule 60(b)(5), and THSteps's compliance with the EPSDT statute. Adhering closely to the strict *Rufo* standard, the Fifth Circuit concluded that "the district court did not abuse its discretion in holding that [the officials] failed to show a significant change in factual circumstances to warrant terminating the consent decree . . . ." *Frazar III*, 457 F.3d, at 441. The Fifth Circuit disapproved the officials' argument that "*Frew II* usher[ed] in a new standard for consent decree modification," creating a more lenient standard for revising consent decrees in institutional-reform cases. *Id.*, at 438.

The officials respectfully submit that the Fifth Circuit got it wrong. The Fifth Circuit overestimated *Rufo*'s changed-circumstances standard in the aftermath of *Frew II*. *Frew II* has altered the standard for terminating or modifying a consent decree in an institutional-reform case. *See* 540 U.S., at 441-42; *see also Hearing on H.R. 1229*, *supra*, at 29 (testimony of David Schoenbrod) ("*Frew [II]* actually changed [the rule regarding modification of institutional-reform consent decrees] rather than restated it."). Indeed, *Frew II*'s new standard was presaged by an entire book, *see* DEMOCRACY BY DECREE, *supra* note 2, and congressional hearings have underscored *Frew II*'s enhanced focus on democratic accountability.

Frew II shifts the focus away from *Rufo*'s changed-circumstances approach and the contract principles on which that standard is chiefly based. *See Hearing on H.R. 1229*, *supra*, at 29

(testimony of David Schoenbrod) ("*[Frew II]* made clear that the proper measure of a decree plaintiffs' rights rather than the deal struck in the consent decree."). Instead, *Frew II* points to a more flexible approach—one that places considerably more weight on democratic accountability and federalism concerns: "[P]rinciples of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion." 540 U.S., at 442. And a federal court "must" account for an official's "high degree of competence in deciding how best to discharge their governmental responsibilities." *Id.*

Although it is true that *Frew II* cited *Rufo*—as both the district court and the Fifth Circuit observed—it is significant that *Frew II* did not restate or provide any reconfirmation of *Rufo*'s component tests, specific language, or underpinnings. *See* Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 918 (2004-05). Absent from *Frew II* was any mention of *Rufo*'s changed-circumstances test and suitably-tailored requirement. Nor was there any mention of consent-decree termination being controlled by contract principles.

These omissions can be fairly read to indicate "a new approach to modifications of consent decrees in institutional reform cases," and signal that a successor official may have a decree revised "based on considerations that were in fact foreseen by the predecessor who consented to the decree, but which the successor now evaluates differently." *Id.*, at 923. In this way, *Frew II* "stakes out a new position that should make it easier for governmental officials to obtain judicial approval when they seek to modify and terminate an existing decree." *Id.*, at 919.

Despite the significant omissions, the Fifth Circuit still read *Frew II*'s citation of *Rufo*—as well as its citation to the pre-*Rufo*

case *Shapp*—as merely restating *Rufo*'s changed-circumstances and suitably-tailored inquiries. *See Frazar III*, 457 F.3d, at 438. But when viewed in their proper context, *Frew II*'s references to *Rufo* and *Shapp* simply support the proposition that Rule 60(b)(5) applies to institutional-reform cases and that district courts should be "flexible" when revising a consent decree. *See Frew II*, 540 U.S., at 441. *Frew II* also cited *Rufo* for the broad propositions that "institutional concerns of government officials" are important when they move to amend a consent decree and that "'principles of federalism and simple common sense require the [district] court to give significant weight' to the views of government officials." *Id.*, at 441-42 (quoting *Rufo*, 502 U.S., at 392 n.14).

That was all that *Frew II* had to say about *Rufo*. The Court gave no indication that the *Rufo* test was the be-all and end-all for decree termination, or that the test was sacrosanct and untouchable. In fact, all indications are to the contrary. The Fifth Circuit therefore misapprehended *Frew II*'s significance as an agent for change in the realm of consent-decree termination and misapplied the *Frew II* decree-termination standard that is an outgrowth of or inevitable next step from *Rufo*.

Furthermore, *Frew II* addresses the issue of what should be done "when an expansive decree exceeds statutory requirements and so lets private lawyers dictate to elected officials." Sandler & Schoenbrod, *Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV., at 917-18. The Court acknowledged that, although state officials may enter into consent decrees initially, doing so hamstrings not only those officials who consented to the decree's entry but also successor officials who did not. Accordingly, as the Court expressly instructed, a decree's remedies must be "*limited to reasonable and necessary implementations of federal law*," and should address "*an ongoing violation of federal law*." *Frew II*, 540 U.S., at 441 (emphasis added). This language from *Frew II* clearly

signals that federal law should be the touchstone of decree termination.

Here, the consent decree's vague and excessively burdensome provisions are neither reasonable and necessary implementations of federal law nor do they address ongoing violations of federal law. In fact, in *Frazar I*, the Fifth Circuit recognized that many of the decree's provisions go well beyond what federal law requires. *See* 300 F.3d, at 545-48. Given this, *Frew II* establishes that a court should grant a motion for equitable relief under Rule 60(b)(5). *See* 540 U.S., at 441.

Moreover, according to *Frew II*, if "the objects of the decree have been attained," a court "*must* exercise its equitable powers" to promptly return "responsibility for discharging the State's obligations . . . to the State and its officials." *Id.*, at 442 (emphasis added). Here, ¶4 of the parties' consent decree sets forth the objects of the decree to be attained:

> "Given the large number of recipients in Texas, improvements to the EPSDT program should improve the lives of many indigent youth. The program also has the potential to improve the overall health of the Texas population, because the percent of young Texans who receive EPSDT benefits is large and increasing. The likelihood that these young Texans will be healthy children and grow into healthy adults increases *if the Texas EPSDT program functions properly. To achieve this end*, recipients and adults responsible for them must be effectively informed about EPSDT and its benefits. Further, young recipients should receive proper health care." R.1554 (emphasis added).

Paragraph 4 reflects that the parties considered the "end" of the decree to be an EPSDT program that "functions properly," which, in turn, reasonably means only one thing: an EPSDT program

"functions properly" when it operates according to the Medicaid Act's EPSDT provisions—the alleged violation of which was the entire basis for initiating this case. Nothing more than providing the class members their statutorily mandated EPSDT benefits is, or should be, required of a properly functioning program under ¶4 of the consent decree. Thus, because the state officials and THSteps have achieved the decree's object of a program that is compliant with the EPSDT statute, they are therefore entitled to Rule 60(b)(5) relief and termination of the consent decree.

Finally, under *Green v. Mansour*, the only basis for plaintiffs' ability to bring this lawsuit against the State was to "end a continuing violation of federal law." 474 U.S. 64, 68 (1985). Absent that federal-law violation, there was no federal-court jurisdiction in the first place. Thus, when *Frew II* referred to "objects of the decree," it did so in the context of longstanding Supreme Court precedent that made clear that the "objects of [a] decree" must be to "end a continuing violation of federal law." And *Frew II* instructs, once that has been achieved, "responsibility for discharging a State's obligations [must be] returned promptly to the State and its officials." 540 U.S., at 442.

CONCLUSION

For these reasons, the Court should grant the state officials' petition for writ of certiorari.

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